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FALSE LABELS AS UNFAIR COMPETITION—JURISDICTION OF FEDERAL TRADE COMMISSION.

The Supreme Court of the United States in an interesting opinion written by Mr. Justice Brandeis, in Federal Trade Commission v. Winsted Hosiery Company, 42 Sup. Ct. 384, holds that the use of false labels constitutes unfair competition as against manufacturers using true labels, and that the fact that the misdescription is so common and frequent that dealers do not accept the labels at their face value constitutes no defense.

The facts, briefly, were as follows: The Winsted Hosiery Company for many years manufactured underwear, which it sold to retailers throughout the country. It branded the cartons in which the underwear was sold as "Natural Merino," "Gray Wool," "Natural Wool," "Natural Worsted" or "Australian Wool." None of the underwear was all wool. Much of it contained only a small percentage of wool, some of it as little as 10 per cent. The Federal Trade Commission instituted a complaint under the Act of September 26, 1914, section 5 (Comp. St., sec. 8836 C), calling upon the company to show cause why the use of these labels should not be ordered to cease, on the ground that they were false and deceptive labels, and why appropriate words of designation rather than the misleading words should not be placed upon the boxes or cartons.

The commission entered an order after due deliberation directing the company to cease from using the labels or brands.

This order was set aside by the Circuit Court of Appeals for the Second District on the ground that, while the label was capable of misleading, it was not within the province of the Federal Trade Commission to interfere (272 Fed. 957, 961).

The Federal Trade Commission then brought certiorari to the Supreme Court of the United States.

On behalf of the hosiery company it was contended that misrepresentation and misdescription of labels have become so common in the knit underwear trade that most dealers no longer accept labels at their face value. The court, Mr. Justice McReynolds dissenting, rejected this argument, and held that the use of the false labels was an unfair method of competition against manufacturers who use true labels and was properly prevented by the commission under the act.

The argument in behalf of the defendant appears to have prevailed with the Court of Appeals, but the Supreme Court expressly declares that it is unsound. The latter Court then goes on to say that the labels in question are literally false, and, except those which bear the word "Merino" are palpably so. All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public. That deception is due primarily to the words of the labels, and not to deliberate deception by the retailers from whom the consumer purchases. While it is true that a secondary meaning of the word "Merino" is shown, it is not a meaning so thoroughly established that the description which the label carries has ceased to deceive the public, for even buyers for retailers and sales people are found to have been misled. The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all-wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers

by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought in the public interest. We quote further from the opinion as follows:

"The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived. The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailers an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition. And trade marks which deceive the public are denied protection, although members of the trade are not misled thereby. As a substantial part of the public was still misled by the use of the labels which the Winsted company employed, the public had an interest in stopping the practice as wrongful, and since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the commission was justified in its conclusion that the practice constituted an unfair method of competition, and it was authorized to order that the practice be discontinued."

This decision is of especial importance not only in defining what constitutes a wrongful use of labels, but also in defining the jurisdiction of the Federal Trade Commission in this respect.

NOTES OF IMPORTANT DECISIONS.

RIGHT OF STOCKHOLDER TO SUBSCRIBE FOR NEW STOCK ISSUE IS NOT GAIN, PROFIT OR INCOME.—The case of Miles v. Safe Deposit & Trust Company, 42 Sup. Ct. 483, holds that the right of a stockholder to take a part of new stock issued by the corporation, whose intrinsic value exceeds the issuing price is analogous to a stock dividend, and does not constitute "gain," "profit" or "income" taxable without apportionment under the Sixteenth Amendment of the Federal Constitution. So far as the issuing price was concerned, payment of this was a condition precedent to participation, coupled with an opportunity to increase his capital investment. The Court held that the above rule applied in either aspect, or both.

DEPORTATION OF RESIDENT CLAIMING CITIZENSHIP WITHOUT JUDICIAL PROCEEDINGS IS A DENIAL OF DUE PROCESS.—In the case of Ng Fung Ho v. White, 42 Sup. Ct. 492, the United States Supreme Court lays down the rule that to deport a resident, who claims to be a citizen of the United States, obviously deprives him of liberty, and may result also in loss of both property and life, so that the constitutional provision guaranteeing due process of law protects such person against deportation without a judicial hearing on his claim of citizenship. The difference in security of judicial over administrative action has been adverted to by the Supreme Court in United States v. Woo Jan, 245 U. S. 552, 556, 38 Sup. Ct. 207, 62 L. Ed. 466, and White v. Ching Fong, 253 U. S. 90, 93, 40 Sup. Ct. 449, 64 L. Ed. 797.

An applicant for work at the Ford plant asked a veteran Ford employee if it were true that the company was always finding methods of speeding up production by using fewer men. The veteran replied:

"Most certainly. In fact," he continued, "I just had a dream which illustrates the point. Mr. Ford was dead and I could see the pallbearers carrying his body. Suddenly the procession stopped. Mr. Ford had come to life. As soon as the casket was opened he sat upright, and, on seeing six pallbearers, cried out at once 'Put this: casket on wheels and lay off five men.'"—Weekly Clarion, Jefferson City, Missouri.

POSSESSION OF LIQUOR UNDER NATIONAL PROHIBITION ACT.

A recent decision of the United States District Court in Florida by Judge Clayton, calls into question the power of Congress to prohibit the possession of intoxicating liquor unless it is connected with the illegal manufacture, sale, transportation, importation or exportation of such liquor. The learned judge admits that he does not know that any court has passed directly upon this question but indicates that the decision of the United States Supreme Court in the case of U. S. v. Jim Fuey[1], is persuasive, because in that case the court said that there would be doubt about the power of Congress to prohibit the possession of opium. This decision is far from being persuasive. There is no authority in the Federal Constitution for Congress to enact a police measure relating to opium. The court held that to construe the act, as applying to possession under the circumstances, would render it unconstitutional because that would be a police regulation under the guise of the taxing power. No one would claim that Congress had police power over opium. It could regulate its importation, exportation and transportation through interstate commerce, and it could tax it, but it could not prohibit its possession. This was a police power and could not be used under the guise of the taxing power. Congress now has power to enact police regulations relative to liquors.

Plenary Power of Government Over Liquor Traffic.—The power of the government to prohibit every phase of the liquor traffic is now well established. The early laws simply prohibited the manufacture and sale of such liquors. Later the laws prohibited the furnishing, giving away, and the transportation of such liquors. Each step in the progress of such legislation raised the question as how far the government could go in prohibiting every act which made possible the use of intoxicants.

(1) 241 U. S. 394.

The state supreme courts soon reached the conclusion that all of these laws prohibiting the manufacture and sale and transportation were enacted for the purpose of preventing the use of intoxicants. It was the use of intoxicating liquor and not its manufacture and sale that produced drunkenness, crime and misery. The supreme courts of Maine, Kansas, Vermont, Alabama, and many other states held that, "The evil to be remedied is the use of intoxicating liquor as a beverage and the object of the law in this particular must not be lost sight of in its interpretation." The United States Circuit Court of Appeals[2] says:

"In trying to comprehend the legislative purpose in Prohibition statutes it is important to remember that the ultimate end sought in Prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage."

It follows, therefore, that if the manufacture and sale of intoxicating liquor may be prohibited because it is the means by which the consumer gets it for use, then by the same reasoning the possession of intoxicating liquor may be prohibited because it is the immediate last act of the consumer in securing it for use which is harmful to him. In other words, as the Supreme Court of Mississippi said:[3]

"The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end."

Laws Prohibiting Possession Sustained.—The laws of Idaho prohibit the possession of intoxicating liquor except as provided in the Act. There was no provision in the Act authorizing the possession of whisky for medicinal purposes. A citizen of Idaho was arrested for possessing a small bottle of whisky. It was for medicinal purposes.

(2) 219 Fed. Rep. 794.
(3) State v. Phillips, 67 So. 651.

The Supreme Court of the State sustained the law on the ground that the possession of such liquor was prohibited and it violated no provision of the state or Federal constitution. The Supreme Court of the United States in the case of Crane v. Campbell[4] sustained this statute. In passing upon this question it said:

"And considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose. We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase, or transportation of such article—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the state. The judgment of the court below must be affirmed."

This decision makes clear the fact that if there were an assured right of possession, as Judge Clayton holds, it would necessarily follow that there should be some adequate method authorized to obtain such liquors which would not be subject to destruction at the will of the state. In other words, if there is a constitutional right to possess liquor it would carry with it the constitutional right to have it manufactured and sold. As a matter of fact, there never has been any such constitutional right to manufacture, sell or possess.

Possession of Liquors Lawfully Acquired Before Prohibition Became Effective May Be Prohibited.—The Supreme Court of Utah said:[5]

"Though claimant acquired intoxicating liquors prior to effective date of Act Feb. 1, 1917, prohibiting possession of intoxicating liquors and abolishing property rights therein, they were confiscable after such effective date."

In the case of Phelps v. State[6], the Court of Appeals of Alabama said:

"It is a violation of the prohibition law for defendant to retain in his possession liquors that were owned and possessed by him before the law became operative."

In the case of State v. Giaudrone[7], the Supreme Court of the State of Washington said:

"Laws 1917, p. 60, section 17h, prohibits entirely the use of intoxicating liquors as a beverage, or the possession thereof for any purpose except those specified, and prohibits the possession of liquor obtained prior to its passage, notwithstanding section 23 and other sections relating to the giving of liquor to guests in private dwellings, etc."

In the case of Lacount v. State[8], the Circuit Court of Appeals of Georgia held in construing the prohibition statute of that state:

"Under the present prohibition laws of the state, the accused will be guilty under an indictment for having and possessing intoxicating liquors if he knowingly has in his possession any quantity thereof, even a spoonful."

These cases could be multiplied from many states of the Union. It is settled beyond controversy that the state may prohibit the possession of liquor, notwithstanding the fact that it was legally possessed by the holder before the law went into effect.

Congress Has the Same Power to Prohibit Intoxicants as the States.—The power of the Federal Government to make prohibition effective was clearly laid down in the case of Ruppert v. Caffey[9], wherein the court said:

"The police power of a State over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors, supported by a separate implied power to prohibit kindred nonintoxicating liquors so far as necessary to make the prohibition of

(4) 245 U. S. 304.
(5) State v. Certain Intoxicating Liquors, 172 Pac. 1050.
(6) 75 So. 877.
(7) 186 Pac. 870.
(8) 104 S. E. 920.
(9) 251 U. S. 264, 64 L. ed. 275.

intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors. Likewise the implied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors, but will effectually prevent their sale. Furthermore, as stated in Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, ante, 194, 40 Sup. Ct. Rep. 106, while discussing the implied power to prohibit the sale of intoxicating liquors, 'When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police powers.' ''

The right of both the state and the Federal governments to prohibit the possession of intoxicating liquors without connecting such possession with the illegal manufacture or sale or transportation of such liquor is clearly established. Possession is the last act of the consumer in securing liquor for beverage use. The purpose of all prohibition laws is to prevent the use of beverage intoxicants. While the early laws did not prohibit the possession of liquor, it nevertheless soon became manifest to the courts that the only purpose of such laws was to prevent the harmful act in question, to-wit, the use of intoxicants, which, as the court said, ''was a source of crime and misery to society.'' The majority of the people at first thought that the evil might be removed by simply prohibiting manufacture and sale, but when it became manifest that the evil aimed at could only be removed by prohibiting every act which contributed toward the use of liquor, even those who used liquor in moderation were willing to give up its use in order that the recognized evil might be eliminated.

WAYNE B. WHEELER.

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COMMERCE—EMPLOYEE OF COALING STATION.

SLATINKA v. UNITED STATES RY. ADMINISTRATION

188 N. W. 20.

Supreme Court of Iowa, May 10, 1922.

An assistant or helper at a railroad coaling station where coal was dumped from cars through a grate into the storage pits, from which it was taken directly and almost immediately to the tenders of engines used in interstate commerce, was engaged in interstate tran portation within the protection of the federal Employers' Liability Act (U. S. Comp. St. § 8657-8665), while enyaged in breaking lumps of coal too large to pass through the grate into the pit.

FAVILLE, J. The Chicago, Rock Island & Pacific Railway Company operates a line of railroad extending from Chicago to certain points in Minnesota and South Dakota, and passing through the town of Traer, in Tama County, Iowa. At said town of Traer the railway company has established a coaling station for the purpose of supplying coal to engines operated on said railway. This is arranged in such a way that the cars that are filled with coal are placed over a pit which is practically 20 feet long and 15 feet wide, and the sides of which slope to a point at the bottom. When a car is placed over this pit for unloading, a lever is operated on the car which permits the hoppers in the bottom of the car to fall down and drop the coal from the car into the pit. There is an iron grate over the pit, and, when the coal is dumped from the car in the manner described, it falls on this grate which catches and holds the larger lumps of coal. After the coal passes through the grate into the pit, it is elevated into the storage bins by a bucket operated by a gasoline engine. It is thereafter drawn from the storage bins as needed, by a form of conveyor which carries the coal from the bin to the tender of the engine. The capacity of the coaling station is about 80 tons, and during the winter time about 1,800 tons of coal are handled each month at the station.

Appellee's intestate was employed as an assistant or helper to the man in charge of this coaling station. The general nature of his business was that of moving cars, dumping the coal into the coal pit, breaking up the large lumps of coal that lodged on the grate, winding up the dumps or hoppers on the cars, cleaning up the scattered coal, and in general doing the necessary things in connection with the unloading

of coal from the cars in which it had been transported and the delivery of the same into the storage bins from which it was subsequently placed in the tenders of the engines as needed. The work of delivering the coal from the storage bin to the tender of an engine is by means of a conveyor, and is done by the fireman of the engine receiving the coal. It appears from the evidence that a carload of coal will not always go into the pit, and also that when coal becomes lodged on the grate it is necessary for an employee to go upon the grate and break the coal into smaller lumps, so it will pass through the grate into the pit. The appellee's intestate usually did this work. At the time of the injury a freight train was switching in the yards. A coal car had been placed over the pit, and appellee's intestate was engaged in the work of breaking the lumps of coal lodged on the grate when the car was moved by the freight engine, and the intestate received the injury which resulted in his death a few hours later. The testimony showed that the engines of trains engaged in both interstate and intrastate commerce regularly received coal at this station. The uncontradicted evidence established the foregoing state of facts.

1. Appellee's action was brought under the federal Employers' Liability Act (U. S. Comp. St. § 8657-8665), and it is the appellant's contention that the decedent was not engaged in interstate commerce at the time of his injury, and that the appellant is not liable under the said act. The question of whether an employee of a railroad company that carries on both interstate and intrastate commerce is, by virtue of the character of his particular employment, engaged in interstate commerce at the time of an injury, has often been before the courts, both federal and state. The general rule on this subject is that, in order for an employee to come within the terms and provisions of the federal act, he must at the time of the injury be engaged in interstate transportation, or in work so closely related to it as to be practically a part of it. This general rule has been announced by the Supreme Court of the United States and by this court. Pedersen v. D., L. & W. Ry. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; Shanks v. D., L. & W. Ry. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60, L. Ed. 436, L. R. A. 1916C, 797. The difficulty lies in the application of this general rule to the facts of any particular case. The authorities are not in harmony, nor are they consistent. We shall review a few of them as illustrating the holdings of the courts.

The leading federal case on the subject, and the one referred to in nearly every decision, state or federal that has passed upon the question, is Pedersen v. D., L. & W. Ry. Co., supra. The case was decided in May, 1913, by a divided court. The plaintiff in said action was engaged in repairing a bridge over which defendant's trains passed in both interstate and intrastate commerce. While carrying a sack of bolts to the bridge he was injured by a train. The court said:

"We are of opinion that the work of keeping such instrumentality in a proper state of repair while thus used is so closely related to such [interstate] commerce as to be in practice and legal contemplation a part of it."

In Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070, the plaintiff was a member of a switching crew, and was assisting in placing cars containing supply coal for the railroad on an unloading trestle within its yards. The cars had been brought from without the state, and had remained upon the sidings and switches from 17 to 24 days before being removed to the trestle. It was held that the switching crew was not engaged in interstate commerce.

In Erie R. Co. v. Collins, 253 U. S. 77, 40 Sup. Ct. 450, 64 L. Ed. 790, the plaintiff operated a signal tower and water tank, the tower being used for the operation of trains in interstate and intrastate commerce. The tank was used for supplying locomotives with water which was pumped from a well into the tank by a gasoline engine, which engine was operated by the plaintiff. While engaged in this service, he was injured. The court reviewed the federal cases at length, and said:

"Plaintiff was assigned to duty in the signal tower and in the pumphouse and it was discharged on both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes therefore within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pumphouse. This may be true, but his duty there was performed and the instrument and facilities of it were kept in readiness for use and were used on both commerces as was demanded, and the test of the cases satisfied."

In Erie R. Co. v. Szary, 253 U. S. 86, 40 Sup. Ct. 454, 64 L. Ed. 794, the plaintiff was employed in what is called the "sand house," a small structure standing in the yards of the railroad company near the track, and in which sand was dried for use in engines. The drying was done in large stoves, which it was plaintiff's duty to attend. The ashes were carried

from these stoves and dumped in the ash pit, and while engaged in this work plaintiff was injured. Referring to the distinctions attempted to be made between the service rendered in interstate and intrastate commerce, the court said:

"The distinctions are too artificial for acceptance. The acts of service were too intimately related, and too necessary for the final purpose to be distinguished in legal character."

In Kozimko v. Hines, Director General (C. C. A.) 268 Fed. 507, the Circuit Court of Appeals of the Third Circuit reviewed the authorities in a case where the decedent had been employed at night to keep fires used in operating a crane that was used to unload coal from cars to the ground in the storage yards. This coal was to be used to accumulate a reverse supply of coal in view of a threatened strike, and for any purpose that coal was needed in the operation of the railroad. The nearest coaling station to this storage pile was about one and a half miles distant, and the coaling station was used to coal engines in interstate and intrastate commerce. The accident occurred about seven miles from the place where the decedent worked. He was injured in going to the station to take a train to the place of his employment, and it was held he was not engaged in interstate commerce. The court said:

"We cannot regard the storing of coal against the contingencies we have named as being so certainly and so closely related to the interstate commerce that might follow 'as to be practically a part of it.'"

In Capp v. Atl. Coast Line, 178 N. C. 558, 101 S. E. 216, a carpenter engaged in repairing a coal chute from which coal was delivered to trains engaged in interstate commerce was held not to be employed in interstate commerce. After reviewing the decisions, the court held that the making of repairs on a structure where coal is stored for the purpose of being supplied to an engine as called for is not such an act as brings the employee within the provisions of the federal statute, "the same being too remote."

In Gallagher v. N. Y. C. Ry Co., 180 App. Div. 88, 167 N. Y. Supp. 480, decided by a divided court, deceased was a carpenter in the general employ of defendant company, and at the time of his death was repairing coal pockets in a coaling station on a side track. Coal from the pockets was used in both interstate and intrastate commerce. It was held that the employe did not come under the federal act.

Let us examine some of the cases that reach an opposite conclusion under somewhat similar facts.

In Horton v. Oregon-Washington R. & N. Co., 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8, the court said:

"The decedent was employed by the defendant as a pumper at Onyx, Idaho, and operated at that place a pumping plant for the purpose of supplying the locomotives of the defendant with water; that decedent lived two or three miles from the pumping plant, and that it was necessary for him to go to the plant daily; that for this purpose defendant furnished him with a small hand car, called a 'speeder'; that on October 8, 1910, while going from his home to the pumping plant, and while operating the speeder on the track of the defendant, decedent was overtaken by an interstate passenger train."

It was held that he came within the liability act.

In Barlow v. Lehigh Valley R. Co., 158 App. Div. 768, 143 N. Y. Supp. 1053, plaintiff was an engineer on a switch engine, and engaged in switching coal cars to a coaling station where the coal was dumped into coal pockets from which it was afterwards discharged through chutes into the tenders of locomotives, part of which were engaged in interstate and part intrastate commerce. The court said:

"Depositing the coal in the pockets was one step towards placing it in the tenders of the locomotive."

It was held that the employee came under the federal act.

In C., R. I. & P. R. Co. v. Bond, 47 Okl. 161, 148 Pac. 103, it appeared that it was the duty of the deceased to order coal for chutes, and, when cars were placed, to unload them into chutes, and from there into the tenders of engines engaged in both kinds of commerce. It was his duty to make and deliver tickets of the amounts of coal unloaded, and he was killed while in the yard taking tickets to the depot, and it was held that he was engaged in interstate commerce within the meaning of the liability act.

In Kelly v. Erie Ry. Co., 188 App. Div. 863, 177 N. Y. Supp. 278, the railroad company had a pumping station. The water was pumped by a gasoline engine from a river into an elevated tank. Plaintiff was engaged in oiling a shaft used in connection with the pumping, and was injured. It was held that the employee was engaged in interstate commerce.

In Gruszewsky v. Director of Railroads, 96 Conn. 119, 113 Atl. 160, from the Court of Errors of Connecticut, it appeared that the rail-

road company maintained in its yards adjoining its tracks a heating plant in which steam was generated and transmitted through pipes to cars standing on the tracks. The steam so generated was used in both inter tate and intrastate commerce. The deceased employee operated the boiler of the heating plant and brought the coal to the boiler from coal cars standing on the track near the boiler house. He contracted pneumonia which was caused by the conditions under which he worked in the activities of his employment. The court reviewed the authorities, and held that the decedent was engaged in interstate commerce, and came within the purview of the federal Employers' Liability Act.

In Roush v. B. & O. R. Co. (D. C.) 243 Fed. 712, the plaintiff alleged that he was employed in a pumphouse that pumped water for the supply of engines that were engaged in interstate and intrastate commerce. He removed the hatch of the cistern to ascertain the depth of water, and was injured by an explosion of gas that had accumulated in the cistern. The court reviewed the authorities, recognized the conflict therein, and held that the plaintiff was engaged in interstate commerce.

In Kamboris v. Oregon-Washington R. & N. Co., 75 Or. 358, 146 Pac. 1097, there was much the same arrangement as to the chute as in the instant case. Deceased was employed in unloading coal cars. The coal was placed in the pockets of the chute to be available for coaling engines. It was emptied into tenders by other employees. The court said:

"In the case at bar we cannot see why the act of furnishing the coal for fuel, and placing the same in the pockets of the chute to be used partly in the engines engaged in interstate traffic, was not just as essential in the matter of running interstate trains as the act of taking the same out of such chute or pockets and placing it upon the tenders of the engines, or any other act of the employees in running the engines and trains transporting such commodities."

In Sells v. Grand Trunk Ry. Co., 206 Ill. App. 45, the plaintiff was an engineer at the coal dock operated by the railroad. The coal was hoisted into a chute from which the tenders of the engines were filled. The railroad company was engaged in both interstate and intrastate commerce. The court held that the business of the plaintiff was the operation of the instrumentality which actually loaded the defendant's interstate commerce engines with fuel, and that he was injured while repairing that instrumentality, and came under the federal act.

The foregoing cases illustrate the holdings of the court under the conditions that are more or less analogous to the situation in the instant case.

We have had the question of liability under the federal act before us under various conditions. In Armbruster v. C., R. I. & P. R. Co., 166 Iowa, 155, 147 N. W. 337, the injured party was employed as a hostler's helper. The hostler brought an engine with a tender attached from the roundhouse to the coal chute. The decedent, as a part of his duties, pulled the apron or conveyer down by seizing a chain, and the coal poured from the bin over it into the tender. The decedent then pushed the apron or conveyor up, and it fell back, striking him and causing the injury complained of. The engine in question was used in transporting a train in interstate commerce. We reviewed a number of the federal authorities, and held that the deceased was employed in interstate commerce at the time of receiving the injury, within the meaning of the federal Liability Act.

In Smith v. Interurban Ry. Co., 186 Iowa, 1045, 171 N. W. 134, a conductor on an interurban railway was injured. The railway was located wholly within the state. The decedent had just completed a trip in which a car had been moved in interstate commerce, but the car had reached its final destination, and the conductor was proceeding to place the motor in the barn when injured. We held that he had completed the interstate service at the time of the injury, and that the federal act did not apply.

In Wright v. Interurban Railway Co., 189 Iowa, 1315, 179 N. W. 877, the defendant operated an interurban railway within this state, which was engaged in both interstate and intrastate commerce. The plaintiff was employed in repairing a room that had formerly been occupied as a substation. It had not been used for a period of 8 or 9 months, but was being restored with the intention of being used in the future. We held that the plaintiff was not at the time of his injury engaged in interstate commerce within the purview of the federal Employers' Liability Act.

We again reviewed the question in O'Neill v. Sioux City Terminal Ry. Co. (Iowa) 186 N. W. 633, where we held that a switchman of a terminal company engaged in switching cars from the terminal to their ultimate destination in the stockyards, part of which cars had been brought from a point outside the state, was engaged in interstate commerce.

2. It is impossible to harmonize all of the cases. We have reviewed a sufficient number of them to indicate the holding of the courts under various facts and conditions. Each case must of necessity be governed by its own particular facts, and the line of distinction between employment in interstate commerce and in intrastate commerce is not always easy of demarcation. Following our previous decisions in similar cases, and also what we believe to be the greater weight of authority, federal and state, we are of the opinion that in the instant case the appellee's intestate, at the time of his injury, while engaged in breaking the lumps of coal upon the grate at the coaling station, which coal was to be immediately placed in bins, from which it was taken directly and almost immediately to the tenders of engines used in interstate commerce as the same was needed in the operation of interstate trains, was engage in work so closely related to interstate transportation, as to be practically a part of it, and therefore this action for damages can be maintained under the federal Employers' Liability Act.

NOTE—Coal Handlers for Interstate Railroad Use as Engaged in Interstate Commerce.—In cases brought under the Federal Employers' Liability Act seeking to recover for injury to or death of an employee engaged in handling coal to be used in engines operated in interstate commerce, it is necessary to determine what stage or point of time in the movement of the coal from the mine to the tender of an interstate engine such coal passes from the control of the state law to the federal, so that the rights of the employee, or his personal representative in case of his death, may be ascertained. 1Roberts, Federal Liabilities of Carriers 898.

An employee engaged in mining coal in a colliery owned by a railroad company, which was to be used in its locomotives in interstate commerce, was not working in interstate commerce within the meaning of the federal act. Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397.

A switchman was not employed in interstate commerce while engaged in transferring a load of coal from storage tracks into a coal chute in the same yard where the coal when thus placed would thereafter be used by interstate engines. Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, 11 N. C. C. A. 992.

The plaintiff, a brakeman on an interstate freight train, was injured while attempting to place a car of coal upon an elevated track leading to the defendant's coal chutes. The coal chutes were used to supply interstate engines with coal. Held that the employee was engaged in interstate commerce at the time of his injury. Chicago, R. I. & G. R. Co. v. DeBord, Texas, 192 S. W. 767. Writ of Certiorari denied by the United States Supreme Court in 245 U. S. 652, 38 Sup. Ct. 12, 62 L. Ed. 532.

A fireman on an engine, injured while assisting in the movement of cars of coal belonging to his employer, from one point to another in the same state, where the coal was to be used later in engines pulling interstate trains, was not engaged in interstate commerce. Barker v. Kansas City, M. & O. R. Co., 94 Kan. 176, 146 Pac. 358.

The case of Squire v. Southern R. Co., 109 S. C. 400, 96 S. E. 152, was an action brought by an administratrix of the deceased employee who was killed by falling from a coal chute. At the instant of his falling he was unloading coal from a Tennessee car onto a platform in South Carolina for future use by engines of the defendant, some of which were state and some interstate. It was held that whether or not the deceased was engaged in interstate commerce at the time of his death was a question which should have been submitted to the jury.

"After the coal is placed in the chutes for the use of interstate engines, it seems that the work thereafter of filling the tenders of interstate engines with coal therefrom possesses such a close and immediate connection with interstate commerce that the rights of an employee injured in the course of such a duty would be governed by the federal and not the state law." 1 Roberts, Federal Liabilities of Carriers 900.

A hostler engaged in dumping coal from the chutes into tender of an engine which was then being prepared to pull an interstate train was engaged in interstate commerce. Armbruster v. Chicago, R. I. & P. R. Co., 166 Ia. 155, 147 N. W. 337.

See also in relation to the proposition last stated, North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, 9 N. C. C. A. 109; Southern R. Co. v. Peters, 194 Ala. 94, 69 So. 611; Guy v. Cincinnati Northern R. Co., 198 Mich. 140, 166 N. W. 667; Giovo v. N. Y. Cent. R. Co., 176 N. Y. App. Div. 230, 162 N. Y. Supp. 1026

A successful Chautauqua lecturer, who is also a lawyer, was presented to his audience as follows: "I am very glad to introduce to you, ladies and gentlemen, Mr. B., who will give his lecture, 'The Trial of Jesus from a Lawyer's Standpoint.' I can imagine only one lecture which might prove more interesting to this audience than the one announced. That would be 'The Trial of a Lawyer from Jesus' Standpoint.'"

Sir Philip Gibbs looks extremely young to be the father of a 19-year-old son. "I had an interview with President Harding shortly after my arrival in America," he said, "and I introduced my son. The President was very much surprised. He said it reminded him of the time when Justice Day, who is a very little man, introduced his son, who is six-foot-four, to Chief Justice White. The Chief Justice looked at this pair and said, A block of the old chip, I guess.'"

HIGH LIGHTS OF THE FEDERAL REVENUE ACT OF 1921.*

*Address before the recent meeting of the North Carolina Bar Association.

Since 1913 when the first revenue measure incorporating a tax upon incomes under the Sixteenth Amendment became a law, the State of North Carolina has furnished the ablest and most conspicuous figures in both the enactment and administration of the federal revenue laws. Osborne as Commissioner of Internal Revenue laid the ground work for a tremendously intricate administrative system. Roper performed a herculean feat in the collection of the stupendous revenues that went to the prosecution of the World War. Neither of these eclipsed in administrative talent or in general ability that fine gentleman who is the present Commissioner, the Hon. David H. Blair.

On the legislative side, the distinguished service of Senator Simmons as Chairman of the Finance Committee is recognized all over the United States and no one member of the Congress for the past ten years is today more widely and favorably known or has shown a broader and more comprehensive view of federal taxation than the late Chairman of the Ways and Means Committee of the House, your distinguished representative and statesman, the Hon. Claude Kitchen. So it is that the Country at large has associated the State of North Carolina in a very intimate way with the enactment and administration of federal revenue legislation since 1913.

Any mention of Federal income taxation at the present time generally calls to mind the War Revenue Acts of 1917 and 1918 and the enormous sums which they levied by their income and excess profits tax sections. Six billion dollars a year were secured in income and excess profit taxes alone.

These huge sums were ungrudgingly paid by American taxpayers during the progress of the war, and furnished the most conclusive evidence of their unselfish patriotism. But with the termination of the emergency, and especially in the next two following years, the War Revenue Acts became more and more unpopular and indeed are now generally conceded to have been for peace time purposes, from an economic standpoint, unsound.

In the first place there was the excess profits tax. It imposed the highest tax rates ever known in America, running as high as 80% on certain portions of corporate income in 1918. While the war was in progress, little protest was heard. Everyone was making money, and, while the burden of taxation was severe, the taxpayer had the money with which to pay and it was a patriotic duty to contribute to the prosecution of the war. But with the industrial depression which came in 1920, the excess profits tax placed an added load on industry already staggering under post war conditions that well nigh paralyzed it.

Moreover, it is safe to say that no tax legislation ever enacted in America was more intricate and difficult of understanding than the excess profits law. No tax law can be satisfactory unless it fulfills three requirements: (1) It must produce the necessary amount of money; (2) It must be susceptible of administration by the government with reasonable accuracy and expense, and (3) It must impose upon the taxpayer no unreasonable burden in ascertaining his true tax liability.

The excess profits tax statutes were sadly deficient in this last respect. By reason of their uncertainty and great complication they not only imposed upon taxpayers a heavy expense in addition to the tax itself but have in many instances rendered the taxpayer's present financial condition so uncertain as to cripple seriously its legitimate plans for future operations. As a result, there are corporations today hanging between solvency and insolvency because

some tax liability which should have been definitely fixed in some instances as long as four years ago has not yet been finally adjudicated.

In the next place were the enormous surtaxes which the war legislation imposed upon individual incomes. These ran as high as 65%. The high surtax rates naturally led individuals having large incomes to invest in state, county and municipal tax-free bonds and to look with disfavor upon investment in industrial securities, the returns from which were subject to the high tax rates. Consequently, industrial concerns in the urgent necessity of refinancing after the war found it difficult to float new loans except at extremely disadvantageous interest rates.

Furthermore, the burden of war taxes served to tie up enormous accrued profits upon which the severity of the tax, both upon corporations and individuals, precluded a realization.

Take the case of a taxpayer who had purchased property say in 1913 for $100,000.00. By 1920, due to the unusual war conditions, its value may have risen to $500,000.00. If he sold out and took his profit of $400,000.00, the tax due the Federal Government would have been approximately $250,000.00. He could not afford to sell. As a result of this and similar situations enormous profits were very effectively frozen and the gains from turnovers that might have gone to the stimulation of industry were thus sequestered to the extreme handicap of industrial rehabilitation.

Perhaps the most harmful feature of the 1918 Act was the discouragement that it placed upon corporate reorganizations. After the war a large number of corporations found it necessary to make readjustments and realignments primarily for financing purposes. This involved in many instances reorganizations, mergers or consolidations. The 1918 Act provided that in such cases a taxable profit accrued immediately to the stockholders when the par value of the new securities received differed from the par value of the old securities surrendered. In practically all these cases no real profit accrued to the taxpayer. He was merely exchanging certain securities for certain others. Yet a tax accrued upon this fictitious profit and the tax itself was enormous. Without any further elaboration, it is sufficient to say that this feature of the law practically rendered impossible the legitimate and often times vital reorganization plans of large industrial concerns.

From this brief summary of the more objectionable features of the war revenue acts, it is apparent that radical changes were necessary if American business was to return to "normalcy." The war legislation served to stagger industry with the burden of excessive taxation; it discouraged investment in industrial securities; it created a reservoir of frozen profits that might otherwise have been realized and thrown into industrial channels; it put a ban upon legitimate reorganizations and generally served to paralyze the readjustment of industry while at the same time it placed a tremendous burden upon its profits.

I would not be understood to say that the war revenue acts were in themselves responsible for the general depression of 1920 and 1921. Many causes, all growing out of the war, contributed to that situation. It is undoubtedly a fact, however, that no single post war factor lent more to the discouragement of industrial readjustment than did the Act of 1918.

With these considerations in mind, Congress approached the enactment of the new revenue bill which finally became a law on November 23, 1921.

The new law is a statute complete in itself. In the House it had been contemplated to frame it as a series of amendments to the Act of 1918, but this pro-

cedure produced such an intricate and confusing result that it was abandoned in the Senate and the new law is therefore complete in itself. While it does not in many respects go as far as some had hoped, nevertheless it will furnish substantial relief from many of the conditions to which I have already adverted.

In the first place the excess profits tax is abolished—effective January 1, 1922. Many had hoped that Congress would repeal this tax as of January 1, 1921. But the urgent necessity for revenue made it imperative that the tax remain effective for the year 1921 even at the risk of further enfeebling industry. But since the first of the current year this tax has been dead, and for 1922 and subsequent years corporations will pay a flat tax of 12½% upon net income.

In the next place surtaxes upon individual incomes have been modified. It is a fact that nearly ten years of administrative experience have now proven that when surtaxes are increased beyond a certain rate the total yield in revenue will decrease. In other words, when the highest surtax upon individual income is 50% more revenue will be produced than when the highest rate is 65%. The explanation is obvious. The higher the surtax the greater will be the investment in securities such as state, county and municipal bonds, the return from which is not taxable by the Federal Government. So it has resulted that in the past three years this country has seen an enormous sale of this class of securities and the net result has been a material decrease in revenue collected.

When Congress came to deal with this phase of the new law a very bitter fight was precipitated. The Treasury Department and the President desired to limit the highest surtax rate to 46% while others contended that the maximum 65% of the old law be retained. The result was a compromise, and the new law continues the 65% rate for the year 1921 and for all subsequent years reduces the highest bracket to 50%.

In this connection a suggestion has been made that, to my mind, is of such vital importance that attention ought here to be directed to it. It has been recently seriously proposed upon the floor of Congress and elsewhere that the Federal Constitution be amended so as to authorize Congress to tax the return upon state, county and municipal bonds and thus to render liable to a federal tax the large amounts of income which now escape it. The end in view may be commendable but the means suggested are so fraught with danger to our old conceptions of American government that, in my opinion, the adoption of such an amendment could be described as nothing short of disastrous.

For the past ten years and especially during the war there has been an ever growing tendency to add additional powers to the Federal Government. This centralization of power in Washington was, of course, indispensable while the emergency lasted but the tendency has persisted with the return to peace. We see federal regulation and federal control today everywhere—government by regulation, with the regulatory power reposing in the central government. No social, political or economic ill can appear today that someone does not immediately suggest some federal action as its cure.

You in North Carolina have seen it only in the last two months. When the Supreme Court in the Drexel Furniture Company case for the second time denied the power of the Federal Government to control the employment of child labor, a power peculiar to the states, it was not a week before Congress had before it the proposition to amend the constitution so as to vest this control in the Federal Government.

I can think of only three or four sovereign functions that today remain in the states—the power to raise money, to elect members of Congress, to administer justice

and to educate the youth. Even then the election of Senators is controlled by Federal legislation. If your state is not unlike the great majority of others the dockets of your federal courts are today more crowded than those of your own state courts. While you may still build your school houses and educate your growing youth, without the supervision of Washington, the cry becomes stronger every day that all education should be under the control of a federal bureau of education. Paternalism, I am convinced, is hastening upon us and in spite of that, one finds many who give serious thought to the adoption of an amendment to the federal Constitution giving to Congress the right to tax the return upon obligations of the state and thus to control it in the raising of money.

How could the state of North Carolina sell $50,000,000 of its bonds 1or building roads if Congress could impose a tax upon the interest from them so that the bonds would return only a bare 2½%? How would you build school houses and streets and public buildings if a federal tax upon your state and municipal obligations made them practically unmarketable? "The power to tax is the power to destroy." It requires no very vivid imagination to envision complete federal control of every real progressive state activity when once the Federal Government has the power to embarrass the state in the raising of money.

I think that we all still love the ancient and inherent Anglo-Saxon right to local self government. I think we all resent, consciously or unconsciously, the continued and increasing interference of the Federal Government in affairs that are peculiarly local. Yet the adoption of the constitutional amendment to which I have just referred cannot fail ultimately to obliterate the last vestige of local self government and the last remnant of the sovereignty of free states. I cannot, therefore, overlook this opportunity to denounce it.

But to continue. We have seen how the war revenue acts practically precluded the realization of profits from the appreciation in value of property. In the illustration that I cited, if a profit of $400,000 resulted from a sale the federal income tax would be about $250,000.00. The 1921 Act has given material relief in these capital gain cases by Section 206. Under the provisions of that section when property which has been held either for profit or investment for more than two years, is sold after 1921, the resulting profit bears a flat tax of 12½% instead of the usual normal and surtax rates. Thus instead of a tax of $250,000 in the case I have cited, the tax under the new law would be only $50,000.00.

This provision will prove extremely beneficial in permitting taxpayers to realize on their accrued gains and thus to turn free money that will ultimately find its way into industrial channels.

I have also mentioned the handicaps that the 1918 Act placed upon legitimate corporate reorganization. That Act imposed a tax as has been seen, where the aggregate par or face value of new stock received was not the same as that turned in. Section 202 of the new act radically changes this provision as well as others dealing with the exchange of property. It is now provided that "when in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization" no gain or loss shall be recognized "even if the property received in exchange has a readily realizable market value."

The importance of this amendment cannot be overstated. It will now make possible realignments and refinancing plans in large industrial concerns that had been vitally necessary but that had been long delayed because of the provisions of the 1918 Act.

But section 202 of the new Act goes farther than this. Generally speaking, it permits the exchange of all sorts of property free from any immediate tax liability unless the property received in exchange has "a readily realizable market value" and even if the property received has a readily realizable market value no tax results when property held for investment or use in trade or business is exchanged for property of a like kind or use. The new property received merely takes the place for purposes of taxation of the old property and no tax is due until the new property is sold and an actual profit is realized.

In other words, where, under the old law, a tax was often times due upon a profit that was purely fictitious under the new law no tax is due in any case until the profit is actually received in money or its equivalent.

These four features of the new law—the repeal of the excess profits tax; the modification of the surtax rates; the capital gain provisions; and section 202 dealing with the exchange of property—are its most important features designed to relieve industrial depression and to stimulate as far as possible a return to normal prewar conditions.

There are, however, several other changes in the new law which are of general importance and interest.

Nothing has been more objectionable and harassing to the taxpayer than the uncertainty of his tax obligations. He might compute and pay his tax in perfect good faith and then two or three years later discover that the Treasury Department claimed an additional tax. Often times the additional liability resulted from a changed construction that the Department had placed upon the law. A new regulation would be promulgated setting out the new Departmental interpretation and since this interpretation had to be applied uniformly the new regulation was in all cases retroactive. As a result many cases that had been settled under the then existing construction placed upon the law, had to be reopened and decided under the new construction. The Department has always been considerably hindered because it had no authority to promulgate regulations without giving them a retroactive effect and this lack of authority precluded any final determination of the liabilities of many taxpayers. Section 1314 of the new law now permits the promulgation of regulations without retroactive effect.

Section 1312 authorizes the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to enter into a final and conclusive determination in writing with any taxpayer of his tax liability and after such agreement has been made no further liability can be enforced except upon a showing of fraud or misrepresentation.

By Section 250 the new law provides that no assessment of additional taxes can be made after five years from the due date thereof for any year prior to 1921 and no additional assessment can be made for 1921 and subsequent years after four years from the date the tax was due except in case of fraud, when no limitation exists.

By Section 250 it is also provided that no suit can be maintained by the Government for additional income and profit taxes after the expiration of five years from the time the return for the year in question was filed.

Under the former laws if an additional tax liability was discovered within three years assessment might be made at any time thereafter and no limitation whatsoever existed against a suit by the Government for additional taxes. The net result of these new statutes of limitation is that, except in case of fraud, no additional tax can be asserted by the Government after five years from the date the same was due.

Taken together the several provisions of the new law which I have just outlined will

eliminate to a great extent the uncertainty and confusion that existed under the old laws and will enable a taxpayer acting in good faith to settle finally and within a somewhat reasonable time all outstanding liability.

Finally, the 1921 Act has provided for a procedure before the Bureau of Internal Revenue which from the standpoint of orderly administration and convenience to the taxpayer is highly satisfactory.

After a return has been filed by a taxpayer it is audited in the Bureau of Internal Revenue. If this audit discloses an overpayment the taxpayer is given credit therefor. If it shows an understatement of liability an additional tax is proposed. In certain cases, Agents of the Bureau make investigations of the taxpayers' books in the field where overpayments or underpayments are likewise discovered. When a deficiency in tax is discovered either by the Bureau or a Field Agent the Commissioner notifies the taxpayer by letter of the additional liability and the taxpayer is invited to present objections if any to the additional tax either by affidavit or by personal conference with representatives of the Bureau in Washington within a reasonable time not to exceed thirty days.

If no objection is made by the taxpayer at the expiration of the time limit therefor a second letter is sent him by registered mail again stating the additional liability. After receiving this second notification the taxpayer may within thirty days appeal to the Commissioner of Internal Revenue for a revision. If no appeal is filed within thirty days the tax is assessed and must be paid within ten days after notice and demand from the local Collector are received. No abatement claim can be filed.

If an appeal is filed within the prescribed time the case goes to the Committee on Appeals and Review before whom the taxpayer may have a personal hearing if he so desires. Questions of law are referred by the Committee to the Solicitor of Internal Revenue before whom the taxpayer may likewise have a formal hearing.

If the case is reversed on appeal, it goes back to the Audit Sections of the Bureau for re-audit in conformity with the Committee's or the Solicitor's opinion; if it is affirmed the tax is assessed and must be paid in the same manner as if no appeal had been taken.

By this new procedure every taxpayer is given a very complete opportunity for a full hearing and an appeal before any additional tax is assessed against him. But after his case has been finally determined he must pay the tax. The long drawnout proceedings that heretofore existed when the additional tax was generally assessed at once and the taxpayer forced to stay collection by filing an abatement claim, have been abolished.

The Bureau has now set up a complete judicial organization before which a taxpayer is assured of a careful and full hearing and a reasonable opportunity to present his case before being called upon to pay any additional taxes.

These then are the high lights in the new Revenue Act. The Act itself is not as simple as had been hoped, nevertheless, the provisions of it, which I have discussed, ought to afford considerable relief to American taxpayers. They are designed to relieve industrial depression and to make the collection of the tax less onerous and less uncertain than has heretofore been the case. The new Act has, as every new piece of legislation necessarily must, injected many new questions into the field of Federal Taxation. Their determination, in the process of its administration, will lend added interest to this still new and highly important branch of the law.

JESSE I. MILLER.

Washington, D. C.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Appeal and Error**—Instruction.—An instruction that, subject to the statute regulating the right of way at street intersections, a person driving a vehicle has a right to go upon a street for the purpose of crossing, and while so doing has an equal right with a street car company to the use of the street, and that each is required to use the street with a reasonable regard to the safety and convenience of the other, held correct.—Austin St. Ry. Co. v. Calhoun, Tex., 240 S. W. 327.

2. **Attorney and Client**—Disbarment.—The Legislature may provide that a conviction of a crime shall ipso facto work a revocation of the right or privilege of such person to continue to act as an attorney and counselor at law, and that the record of conviction of a crime involving moral turpitude shall constitute conclusive evidence thereof for the purpose of striking such attorney's name from the rolls.—In Re Collins, Cal., 206 Pac. 990.

3. **Automobiles**—Collision.—An automobile driver cannot persist in the assumption that an approaching automobile will turn to the right, as required by G. L. 4705, after he knows facts showing that the presumption is not true, after which he must exercise the care of a prudent man to avoid collision.—Hatch v. Daniels, Vt., 117 Atl. 105.

4.——Collision.—Where automobile collision caused one of the automobiles to be thrown in path of fire truck, the operation of the fire truck at an excessive rate of speed if truck was so operated was not the proximate cause of death of automobile driver; the casting of the automobile in the path of the truck being an efficient intervening cause.—Johnson v. City of Omaha, Neb., 188 N. W. 122.

5.——Contributory Negligence.—In an action for the death of a boy not 14 years old, who was not shown to have had the discretion and capacity of a boy of that age, where there was evidence that the street on which he was playing was seldom used by automobiles because of its bad condition, requested charges that it was the duty of the boy to look and listen for approaching automobiles were properly refused under the evidence.—Southen Express Co. v. Roseman, Ala., 91 So. 612.

6. **Bankruptcy**—Controversy.—A proceeding by a creditor of the bankrupt to reclaim property in the hands of the receiver presents a controversy arising in bankruptcy proceedings, and the proper remedy for review is appeal, under Bankruptcy Act, § 24a, and not a petition to revise, under section 24b.—In Re B. & R. Glove Corporation, U. S. C. C. A., 279 Fed. 372.

7. **Banks and Banking**—Bank Guaranty Act.—In the absence of statute, all creditors of a failed bank, including depositors and other creditors, participate equally and ratably in its assets, but under Bank Guaranty Act, § 10, only those specified as guaranteed depositors by section 1 participate in the guaranty fund.—State v. Duke, Wash., 206 Pac. 918.

8.——Deposit.—When a bank gives a depositor credit for the amount of a check drawn on it by another depositor in the absence of fraud or collusion, the effect is the same as if the actual cash had been paid the depositor, and though on the same day the bank's officials ascertain that they have made a mistake, and that the drawer did not have sufficient money to meet the check, the depositing customer's rights are not thereby affected.—First Nat. Bank v. Mammoth Blue Gem Coal Co., Ky., 240 S. W. 78.

9.——Error in Account.—The refusal of a depositor, after a bank had refused to pay his checks, to assist it in correcting an error in his account would not constitute a defense, but only a matter in mitigation.—Berea Bank & Trust Co. v. Mokwa, Ky., 239 S. W. 1044.

10. **Bills and Notes**—Indorser's Liability.—Where presentment for payment is waived in a promissory note, the indorser is not entitled to notice of nonpayment.—Scott v. Smith, Idaho, 206 Pac. 812.

11.——Negotiability.—Negotiability of note is not destroyed by failure to place on it the required revenue stamps.—Richardson v. Cheshire, Iowa, 188 N. W. 146.

12.——Party in Interest.—Where notes payable to bearer are in plaintiff's possession and are produced by plaintiff, payment thereof to the plaintiff will protect the defendant from the claims of third parties, and that is the test as to whether the plaintiff is a real party in interest.—Continental Secur. Co. v. Interborough R. T. Co., N. Y., 193 N. Y. S. 892.

13.——Reissuance.—The maker of a note secured by a trust deed may reissue it before or after maturity so as to bind himself and his assigns as affectively as in the first instance.—Klaiber v. Jorcke, Mo., 239 S. W. 880.

14.——Trust Receipts.—Trust receipts issued against shares of stock, deposited with a banker, are not negotiable instruments and do not, by themselves alone, vest ownership of the stock in the holders thereof.—Hearne v. Gillette, La., 91 So. 634.

15. **Carriers of Goods**—Bill of Lading.—Where consignor in straight bill of lading for interstate shipment obtained loan on security of shipment, and delivered to bank its draft drawn on factor consignee for the amount of the loan, the legal title to the bill of lading passed to the bank, and though the carrier properly delivered the shipment to the consignee without presentation of the bill of lading, such consignee, after it had notice that the bill of lading and draft accompanying it had been transferred to the bank, had no right to make a sale and apply the proceeds on the indebtedness due it by the consignor without paying the draft, under Act. Cong. Aug. 29, 1916.—George F. Hinrichs, Inc. v. Standard Trust & Sav. Bank, U. S. C. C. A., 279 Fed. 382.

16.——Bill of Lading.—The provisions of Comp. St. U. S. § 8604g, that any alteration in a bill of lading without authority from the carrier, either in writing or noted on the bill, shall be void, do not apply to a parol agreement between the consignor and the parties to be notified authorizing them as agents to receive the goods from the carrier without the production or surrender of the bill of lading.—Kemper Mill & Elevator Co. v. Hines, Mo., 239 S. W. 803.

17. **Carriers of Live Stock**—Delay.—In an action for damages from delay in an interstate shipment of live stock, resulting in shrinkage and loss from a declining market, it is not sufficient for plaintiffs to make out a case of mere delay, but the burden is on them to prove negligent delay; and where the causes of the delay and facts surrounding them are wholly within the defendant's knowledge, plaintiffs need to prove defendant's negligence only by circumstances raising a slight inference of negligence.—Harrison v. Chicago & A. R. Co., Mo., 239 S. W. 871.

18. **Carriers of Passengers**—Alighting.—A street car passenger, injured while alighting from a moving car, may recover damages if, as claimed, the conductor negligently opened the door and ordered him to get off before the car had been brought to a stop, and the car was negligently given a sudden and violent jerk, and its speed suddenly and vio-

lently increased, while he was alighting, without giving him a reasonable time to alight.—Leonard v. United Rys. Co. of St. Louis, Mo., 239 S. W. 892.

19. **Citizens**—Native-Born Japanese.—A native-born child of Japanese parents is an American citizen and as such entitled to acquire and hold property, real and personal, and her infancy did not incapacitate her from becoming seized of the title to real estate.—In Re Tetsubumi Yano's Estate, Cal., 206 Pac. 995.

20. **Constitutional Law**—Due Process.—Code Prac. art. 571, permitting one not a party to the suit, but who is aggrieved by the judgment, to appeal therefrom, does not deprive the appellee, who is entitled to citation or notice of appeal and an opportunity to be heard, of her property without due process of law.—Taylor v. Allen, La., 91 So. 635.

21.——Due Process.—A foreign corporation, which obtained the privilege of conducting a pipe line business in Oklahoma after the adoption of the Constitution of Oklahoma, which by article 9, §§ 15-35 provided for a corporation commission with large powers of supervision over pipe line companies, and the enactment of Rev. Laws Okl. 1910, §§ 4304—4318, which by sections 4304, 4309, 4311, made all pipe lines common carriers, and required corporations engaged in that business to file an acceptance of the act, cannot contend that it was deprived of its property without due process of law, by being held to the obligations of a common carrier.—Pierce Oil Corporation v. Phoenix Refining Co., U. S. S. C., 42 Sup. Ct. 440.

22. **Corporations**—Claim Against Promoter.—Where the promoter of a corporation, to whom all of its stock was issued, agreed with persons purchasing stock from him that the proceeds would be used to buy automobiles to be sold by the corporation, the profits to belong to it, but an automobile taken in exchange for one sold by the corporation was used to settle a claim against the promoter, thereby decreasing the profits, he was properly required to account to the corporation for its value.—Cavicchi-McDonald Motor Car Co. v. Gleason, Mass., 135 N. E. 309.

23.——De Facto.—Corporations may be organized without capital stock though not of a charitable, social, religious, or eleemosynary character; "profit."—Read v. Tidewater Coal Exchange, Del., 116 Atl. 898.

24.——Director De Facto.—Where one who was not a director de jure, because not a stockholder, as required by the by-laws, and because the number of directors had not been legally increased, knew of his election and never declined or resigned the office, but believed he was a director, and knew that the company advertised the fact by placing his name on its letter head, he was a director de facto, and third persons had a right to hold him subject to the fiduciary obligations of a director.—Lazenby v. Henderson, Mass., 135 N. E. 302.

25.——Fraudulent Purchase of Stock.—Where two stockholders of a corporation fraudulently purchased the stock of a third, by misrepresenting the amount which their purchaser was to pay for all of the stock of the corporation, the defrauded stockholder could sue in equity to impress a trust on the proceeds of the sale of the stock and the securities received therefor and for an accounting, since his remedy at law would be restricted to the value of his shares, if he rescinded, or to the difference between the value and the amount he recived, if he affirmed while in equity he may reach all the proceeds of the resale, though the price received on such resale exceeded the value, and equity will not be overnice in balancing the efficacy of one remedy against another, when action will baffle, and in action may confirm, the purpose of wrongdoer. Falk v. Hoffman, N. Y., 135 N. E. 243.

26.——Receivership.—The mere adoption of a resolution by a board of directors of a corporation that the corporation is unable to meet its obligations as they mature does not necessitate per se the appointment of a receiver.—Duval v. T. P. Ranch Co., La., 91 So. 656.

27.——Rights of Bondholders.—Bondholders of a corporation, who have proved their claims and received their share of a fund held for pro rata distribution among all bondholders, held to have no title or right to a portion of the fund undistributed, because the bonds to which it was allotted have not been proved.—Brown v. Pennsylvaia Canal Co., U. S. C. C. A., 279 Fed. 417.

28.——Sale of Stock.—A false statement in the caption of the certificate that the stock was non-assessable was immaterial, where the subscriber did not see the certificates until after he had completed the purchase of the stock and admitted during the negotiations that he knew he might thereafter be required to pay the par value of the common stock given to him as a bonus on his subscribing for preferred stock.—Parnes v. Gnome Mfg. Co., N. J., 117 Atl. 148.

29. **Damages**—Earning Power.—In an action by a fireman for personal injuries, evidence of his earning power as a painter before he became a fireman and his ability to resume that trade held admissable, as an employment as a city fireman is a mere "political job," not a "trade" or "profession."—Union Traction Co. v. Taylor, Ind. 135 N. E. 255.

30. **Equity**—Laches.—Lapse of time alone, unaccompanied by other circumstances, to constitute laches, must be such as to make the claim a stale one, in determining which courts of equity are disposed by analogy to following the statutes of limitations, though such statutes are not in terms applicable to equity, but attending circumstances may make what might appear to be a stale claim one entitled to present recognition, or may deprive a fresh and recent claim of title to favorable consideration, the test being whether the delay is under circumstances that makes it unconscionable or a court of equity will lend aid to its enforcement.—Scotton v. Wright, Del., 117 Atl. 131.

31. **Frauds, Statute of**—Option to Cancel Contract.—A contract which by its terms is not to be performed within a year from the making thereof is not taken out of the statute of frauds by a reservation of an option to cancel the contract by one or both of the parties thereto.—Seder v. Grand Lodge, A. O. U. W. of North Dakota, Idaho, 206 Pac. 1052.

32.——Verbal Promise.—The verbal assumption and promise for a valuable consideration to pay the debt of another is not within the statute, notwithstanding the maturity of the debt assumed was more than a year after the verbal promise to pay the same.—Texas & Pacific Coal & Oil Co. v. Patton, Tex., 240 S. W. 303.

33. **Insecticide Act**—Adulteration.—An insecticide or fungicide known as "Kil-Tone" was not adulterated or misbranded by reason of addition of water to the net weight to take care of evaporation, though it increased the volume of the contents of the package, and may have caused the proportion of the active ingredients to appear less than called for by the labels; it being stated on the label that water was added "in addition to the net weight."—United States v. 323 Packages of "Kil-Tone," U. S. C. C. A., 279 Fed. 398.

34. **Insurance**—Adjustment Agreements.—When an insurance adjuster is employed and directed by an insurer to adjust a loss in a particular case, and agrees with the insured on the sound value of property destroyed, the monetary loss of the insured and the pecuniary liability of the insurer, and definitely agrees with the insured on a compromise settlement of his claim at a certain sum owing from the insurer to the insured, and nothing further is to be done, except payment of the sum agreed upon, the adjustment is final and binding on the insurer, in the absence of fraud or mistake.—Solomon v. Commonwealth Ins. Co., Del., 117 Atl. 126.

35.——Attorney's Fee.—The attorney's fee, which the statute permits to be recovered from an insurance company upon its failure to pay the loss after demand made, is given to reimburse the policy holder for expenses incurred in enforcing the contract of indebtedness and is taxed as costs in the case, so that such fee is a part of the recovery against the insurance company, the legal meaning of "recovery" being the obtaining of a thing by the judgment of a court, as the result of an action brought for that purpose.—Vaughan v. Humphreys, Ark., 239 S. W. 730.

36.——Automobile Policy.—Under automobile fire insurance policy providing that the automobile must not be used in public service, if the automobile was not in public service when destroyed, the policy was not forfeited because it had been in public service.—Graham v. Standard Fire Ins. Co., S. C., 112 S. E. 88.

37.——Forfeiture.—Where a fraternal beneficiary association, organized under the statute of Nebraska, raised its rate of assessment, a forfeiture cannot be enforced against a member for nonpayment of an assessment based on said increased rate until after notice of such change of rate has been given for the time and in the manner provided for by section 3295, Rev. St. 1913; and the burden of proving such notice rests upon the party claiming such forfeiture.—Sharpe v. Grand Lodge, A. O. U. W., Neb., 188 N. W. 100.

38.——Forfeiture.—An insurance company will not be permitted to defeat a recovery upon an insurance policy issued by it, by proving the existence of facts which would render it void, where it had full knowledge of such facts when the policy was issued.—Mull v. United States Fidelity & Guaranty Co., Idaho, 206 Pac. 1048.

39.——Insurable Interest.—If insured is under a moral obligation to render care and attention to the beneficiary in time of need, the beneficiary has an insurable interest other than a mere pecuniary one in insured's life.—Young v. Hipple, Pa., 117 Atl. 185.

40.——Value of Premises.——In an action for breach of an insurance agent's agreement to insure plaintiff's property for an additional amount, it was immaterial whether the property, which had been totally destroyed, was worth the amount of the original and additional insurance, in view of Rem. Code 1915, § 6059—105½, making the amount of the policy conclusive as to the loss in case of total destruction.—Sheller v. Seattle Title Trust Co., Wash., 206 Pac. 847.

41. **Intoxicating Liquors**—Insufficient Indictment.—An indictment charging in one count that defendants conspired to violate title 2 of the National Prohibition Act in that they "would then and there possess certain intoxicating liquors (describing them), contrary to the provisions of said act," and in the second count that the same persons, at the same time and place, "unlawfully and knowingly did possess certain intoxicating liquors" described, held insufficient to charge an offense in either count.—Hilt v. United States, U. S. C. C. A., 279 Fed. 421.

42.——Transportation.—Const. Amend. 18, prohibiting the transportation of intoxicating liquors, and National Prohibition Act, tit. 2, § 3, liberally construed under the terms of the act, prohibit the transportation of intoxicating liquor across the United States from Canada to Mexico, or the transshipment of such liquor from one British ship to another, while within a port of the United States, notwithstanding Rev. St. § 3005, as amended, permitting merchandise arriving in any domestic port destined to a foreign port conveyed through the territory of the United States without payment of duties, and article 29 of the Treaty with Great Britain of May 8, 1871, permitting merchandise arriving at certain ports destined to British possessions in North America to be conveyed across the United States without payment of duties, especially in view of the express permission by National Prohibition Act, tit. 3, § 20, for transportation through the Canal Zone.—Grogan v. Hiram Walker & Sons, U. S. S. C., 42 Sup. Ct. 423.

43. **Landlord and Tenant**—Lease.—A lease of the entire floor of a building carries with it the appurtenant right to exclude signs advertising the business of persons other than the tenant from those parts of the walls which form the inclosure of the floor.—Stahl & Jaeger v. Satenstein, N. Y., 135 N. E. 242.

44. **Limitation of Actions**—Amended Complaint.—In action against city for injuries to pedestrian who fell upon sidewalk when brick implanted in the earth, upon which she had stepped to avoid slipping in the mud, turned under her foot, the court properly allowed plaintiff, after the two-year statute of limitations had run, to amend her statement so as to aver a brick in place of a stone as the object with which her foot came into contact.—David v. Borough of Shenandoah, Pa., 117 Atl. 207.

45. **Mandamus**—Inspection of Books.—Mandamus will not issue to require respondent to permit relator to inspect the books of another separate and independent corporation, merely because respondent is a majority stockholder of such corporation, it having neither possession or control of them, and not having used its power as such majority stockholder; the writ not issuing where respondent is not shown to be in a position to comply.—State v. Sherman Oil Co., Del., 117 Atl. 122.

46. **Master and Servant**—Dependent.—Under Industrial Commission Act as to dependents, a young sister, living with her mother and stepfather, is not a dependent of her young brother living apart, because of his occasional gifts to her at his pleasure.1—American Fuel Co. of Utah v. Industrial Commission of Utah, Utah, 206 Pac. 786.

47.——"Working Place" Defined.—Under Acts 1911, p. 513, § 35, requiring every workman in a mine to examine his working place before commencing work, a miner must assume actual control of working rooms assigned to him, take possession, and thereafter have reasonable time to inspect and examine them to see if they are in safe condition before commencing work, for them to constitute in law his "working place."—Sloss-Sheffield Steel & Iron Co. v. Jones, Ala., 91 So. 808.

48. **Mortgages**—Notice of Judgment.—One taking a mortgage from H. L. H. the proceeds of which were used to satisfy a prior mortgage, describing the mortgagor as H. L. H. sometimes called H. H., and the record of which was marked satisfied before the new mortgage was accepted, was not negligent in failing to examine the old mortgage and not charged with notice that H. L. H. was known as H. H. or with notice of a judgment indexed against H. H.—Pennsylvania Co. for Insurances on Lives, etc. v. Halpern, Pa., 117 Atl. 197.

49. **Municipal Corporations**—Awnings.—An ordinance requiring awnings to be at least 7 feet and 6 inches above the sidewalk, and to be kept rolled or folded against the building, except when the sun shines on the part of the building on which placed, is to be construed as intended so to regulate the construction and maintenance of awnings as not to interfere with the safety of persons rightfully using the way, except as is necessarily involved by compliance with its provisions.—Dalton v. Great Atlantic & Pacific Tea Co., Mass., 135 N. E. 318.

50.——Defective Sewer.—Where plaintiff's child was drowned in a sewer while she was passing across private property from one house to another, when the bank of the sewer under the path she was traveling caved into the sewer, the city is not liable, under the attractive nuisance doctrine, even though children sometimes played on the sewer bank, since plaintiff's child was not attracted by the sewer.—Brose v. City of Dubuque, Iowa, 187 N. W. 857.

51.——Street Paving.—Under Burns' Ann. St. 1914, § 8710, authorizing property owners along a street to be paved to require the board of public works to adopt detailed specifications for some kind of pavement other than those originally designated, the owners may determine the kind of pavement but cannot compel the board, after accepting a bid for Mexican asphalt, to accept Trinidad Lake asphalt, though both comply with the specifications, the details, specifications, and manner of producing the pavement being for the board.—McGuire v. City of Indianapolis, Ind., 135 N. E. 257.

52.——Negligence—Attractive Nuisance.—Anunattractive, immobile trestle, supporting a tramroad and merely used by decedent when injured and by many others daily as a walkway, is not an attractive nuisance.—Sage's Adm'r v. Creech Coal Co., Ky., 240 S. W. 42.

53. **Railroads**—"Equipment."—Under the federal Employers' Liability Act, providing for actions for injury or death from defects due to the carrier's negligence in its "works" or "other equipment," where a fireman, in alighting from an engine on a platform, slipped on ice and fell under a train, his employer was not liable, since the platform is not a part of the "works" or equipment, the equipment being one that is applied to personal property and not to structure, such as machine shops, round houses, depot platforms, and the like, and the term "works" having reference to working places other than the tracks, roadbed, and their incidents.—Elliott v. Payne, Mo., 239 S. W. 851.

54. **Sales**—Breach of Contract—Where the buyer under a contract to purchase milk for a year notified the seller that he would accept no more milk after a stated date, the seller was not required to tender delivery of the milk after that date to entitle him to recover damages for breach of contract. §§Temple v. Duffy, Vt., 117 Atl. 101.